

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

DEL and CHERIE IRISH, ) NO. CV-05-134-LRS  
individually, and as a marital )  
community; and as guardian ad ) ORDER  
litem of JANE DOE IRISH, a )  
minor, )  
Plaintiffs, )  
-vs- )  
WHITMAN COUNTY, a quasi- )  
municipal corporation, )  
Defendant. )

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Before the Court is the Defendant Whitman County's Motion for Summary Judgment (Ct. Rec. 35); Defendant's Motion to Have Defendant's Uncontroverted Facts Deemed Admitted Pursuant to LR 56.1(d) (Ct. Rec. 60); and Defendant's Motion to Strike Portions of Edward Mott's Affidavit (Ct. Rec. 71). A hearing was held November 9, 2006. Michael Nelson participated on behalf of the Plaintiffs; Michael McFarland participated on behalf of Defendant. This order is intended to supplement, confirm and incorporate the provisions of the oral ruling rendered by the Court at the close of argument at the aforementioned hearing.

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ORDER - 1

## **SUMMARY OF FACTS**

In August 1997, Howard Banks was hired as a Corrections Officer for Whitman County Sheriff's Office. From December 26, 2003 through March 12, 2004, Banks was employed as a jailor at the Whitman County Jail. Banks worked the "graveyard" shift. In 1998, Howard Banks requested to bring his wife Jacqueline to work. Captain Ingalls authorized Banks to bring his wife to work but did not anticipate that this would be a frequent occurrence or request. Over the next couple of years, Banks made the request that he be allowed to occasionally bring his sons to work with him. Cpt. Ingalls gave him permission and did not anticipate this would be a frequent occurrence either. In approximately 2001, Cpt. Ingalls learned that a couple of graveyard officers had complained that Banks was abusing the permission Ingalls had given him to bring his wife to work. It was interfering with the performance of their jobs.

Cpt. Ingalls approached Banks and advised that he needed to have specific permission from the sergeants or Cpt. Ingalls for each visit. Thereafter, Banks did approach Cpt. Ingalls occasionally with requests for permission to bring visitors to work with him. Banks requested on separate occasions permission to bring in his wife, a nephew, a friend, and a niece, which was granted by Cpt. Ingalls.

In November 2003, the Irish family was introduced to the Banks family through mutual family friends, Larry and Carol Roberts. The introduction had no relationship or connection with Banks' employment.

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1       The Irish and Banks families were neighbors. Prior to December 26,  
2 2003, Jane Doe Irish spent the night at the Banks' house on at least one  
3 occasion and began calling Howard Banks "dad" and Mrs. Banks "mom."

4       On December 26, 2003, Larry and Carol Roberts' daughter Christina  
5 asked Jane Doe Irish, her good friend, to go to work with Howard Banks  
6 and her at the Whitman County Jail. This was the first time Jane Doe  
7 Irish went to work with Banks. The Defendant County states that this  
8 visit was not authorized.<sup>1</sup>

9       After December 2003, Jane Doe Irish's parents began spending more  
10 and more time with Howard and Jacqueline Banks and loaned each other  
11 money, video games, and movies. Commencing in January 2004, the Irish  
12 family hosted Mr. and Mrs. Banks for dinner approximately twice weekly  
13 and the Banks' hosted the Irish couple for dinner approximately once a  
14 week. As the couples spent more and more time together so did Jane Doe  
15 Irish and she began going to the Banks' house "almost every day."

16       Jane Doe Irish even began spending the night at the Banks' house  
17 with some degree of frequency. Commencing in February 2004 and  
18 continuing until April 8, 2004, Banks had sexual contact with Jane Doe  
19 Irish three or more times at his private residence.

20       Jane Doe Irish went to work with Banks three times during January  
21 2004 and five times in February 2004. Banks and the Defendant County

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25       <sup>1</sup>Conflicting testimony is offered by Plaintiffs, relying on Howard  
26 Banks' deposition testimony. See Attachment 5 of Ct. Rec. 49, Banks  
Dep., p. 38:12-17. The Court finds, however, the disputed evidence does  
not materially alter the Court's analysis or preclude summary judgment.

1 indicate that these visits were not authorized and there is no evidence  
2 cited by Plaintiff to the contrary. It is also undisputed that there was  
3 never any sexual conduct between Banks and Jane Doe Irish at the Whitman  
4 County Jail.

5 Shortly before March 12, 2004, Cpt. Ingalls learned that Banks had  
6 two minor female visitors with him at work without Ingalls' permission.  
7 At the time Ingalls had received the report regarding the two minor  
8 female visitors, he had no information that caused him to suspect that  
9 there was any inappropriate relationship going on between the girls and  
10 Banks.

11 On March 12, 2004, either Sheriff Myers or Undersheriff Rockness  
12 received a phone call from either Deputy Sergeant Chris Chapman or  
13 Captain Robert Ingalls regarding concerns received from Cherie Irish  
14 regarding the off-duty and possibly criminal behavior of Banks. Cherie  
15 Irish requested a meeting to share her concerns about Banks' conduct  
16 directed at her minor daughter and one of her daughter's minor friends,  
17 Christina Roberts. Sheriff Myers gave instructions to schedule a meeting  
18 immediately. Sheriff Myers advised that he wanted Deputy Sergeant Myers  
19 and Captain Ingalls to attend the meeting. Captain Ingalls contacted  
20 Whitman Prosecuting Attorney Denis Tracy and asked him to also attend the  
21 meeting.

22 On that same day, March 12, 2004, the meeting was held.  
23 Prosecuting Atty Tracy, Sgt. Chapman, and Cpt. Ingalls met with Cherie  
24 Irish, and a woman who accompanied Mrs. Irish to the meeting. At this  
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1 meeting, Mrs. Irish expressed concern that Banks was "grooming" Jane Doe  
2 Irish and Christina Roberts, and that he may be having sexual contact  
3 with Ms. Roberts. Mrs. Irish did not express concern that Banks was  
4 having sexual contact with her daughter, and stated she did not believe  
5 that there had been any such sexual contact. The March 12, 2004 meeting  
6 was the first time Cpt. Ingalls and the Whitman County Sheriff's Office  
7 first learned of any allegations against Banks developing possible  
8 inappropriate contact by him with minors.

9         Shortly after the meeting, Sgt. Chapman and Deputy Eastep commenced  
10 an investigation into the allegations. Both Sgt. Chapman and Deputy  
11 Eastep have training relating to the investigation of sexual crimes and  
12 child abuse. As part of the investigation, Sgt. Chapman and Deputy  
13 Eastep interviewed Jane Doe Irish, Christina Roberts, Tracy Deel,  
14 Jacqueline Banks and Howard Banks. None of these witnesses reported any  
15 information indicating that Banks was having sexual contact with Jane Doe  
16 Irish and Jane Doe Irish adamantly denied any such sexual contact. Thus  
17 after reviewing all of the evidence, Sgt. Chapman was unable to conclude  
18 that Banks had engaged in any criminal activity, and therefore closed the  
19 investigation as "unfounded." Sgt. Chapman shared the results of the  
20 investigation with Prosecuting Atty Denis Tracy and Sheriff Myers.  
21 Sheriff Myers agreed with the conclusion to close the investigation.

22         On this same date, March 12, 2004, after learning from Cherie Irish  
23 that Banks brought unauthorized visitors to work with him, Sheriff Myers  
24 instructed Cpt. Ingalls to immediately put an end to the same, and to

1 document his directive to Banks in writing. On March 15, 2004, Cpt.  
2 Ingalls met with Banks about having brought unauthorized visitors to work  
3 with him. Cpt. Ingalls made it clear to Banks that he was to have no  
4 more visitors at work and gave him a written directive.

5 Jane Doe Irish never went to work with Banks after March 12, 2004.  
6 There is no evidence suggesting that Banks violated the oral and written  
7 directive from Cpt. Ingalls. Neither did he bring unauthorized visitors  
8 to the jail after March 12, 2004.

9 On July 7, 2004, at 12:09 a.m., almost four months later, Whitcom  
10 (sheriff's communications facility) radioed Sergeant Rick McNannay,  
11 advising that the Sheriff's Office received a call from Cherie Irish  
12 reporting that her 13 year old daughter, Jane Doe, had been raped. Mrs.  
13 Irish requested that a deputy contact her.

14 After Cherie Irish's call, Sgt. McNannay immediately phoned Mrs.  
15 Irish at her residence and she advised that Banks had raped her daughter  
16 two or three times. Sgt. McNannay made arrangements to contact Mrs.  
17 Irish and her daughter at their residence in Malden where he interviewed  
18 Jane Doe Irish who told him that Banks had raped her.

19 Deputy Mike Bogenreif and Sgt. McNannay thereafter proceeded to  
20 Banks' residence to speak to him. Upon arrival, Jacqueline Banks told  
21 them that her husband Howard Banks had gone missing and that she was  
22 concerned he was suicidal. Sgt. McNannay contacted Whitcom and had them  
23 put an "ATL" on Banks and his vehicle.

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1       On July 10, 2004 at 12:00 p.m. Sgt. McNannay received a tip that  
2 Banks was at his residence. Sgt. McNannay drove to the residence and met  
3 with Banks and Mirandized him. Banks then confessed to having sexual  
4 contact with Jane Doe Irish. He was immediately arrested and transported  
5 to the Whitman County Jail where he was booked.

6       September 17, 2004, Banks pled guilty to two counts of Second Degree  
7 Rape of a Child. On January 14, 2005, Mrs. Banks pleaded guilty of one  
8 count of Second Degree Child Molestation arising from her contact with  
9 Jane Doe.

10      **IT IS ORDERED, ADJUDGED AND DECREED:**

11      1. Defendant's Motion to Have Defendant's Uncontroverted Facts  
12 Deemed Admitted Pursuant to LR 56.1(d), **Ct. Rec. 60**, is **GRANTED**.  
13 Plaintiffs did not oppose this motion.

14      2. Defendant's Motion to Strike Portions of Edward Mott's  
15 Affidavit, Ct. Rec. 71, is **GRANTED**. Certain portions of the affidavit  
16 were found to be inadmissible based upon their conclusory nature, their  
17 lack of relevance and/or the affiant's lack of demonstrated personal  
18 knowledge or speculation. Plaintiffs did not file briefing or present  
19 oral argument in opposition to this motion.

20      A) ¶4(A): "Deficiencies in the operational policies and procedures  
21 which lead to the use of the jail facility by a jailer to "groom" Jane  
22 Doe Irish . . .". Finding: The expert may not testify that these  
23 deficiencies led to the grooming of Jane Doe as this assertion is  
24 conclusory, speculative and without demonstrated foundation in fact; even  
25 if otherwise relevant, issue would be one for trier of fact in a proper  
case.

26      B) ¶4A: "deficiencies in the operational policies and procedures .  
. . [led to] the sexual assaults committed against her by [Howard Banks]."  
Finding: Statement is based on speculation without demonstrated

1 foundation in fact, and expert lacks the expertise to render such a  
 2 decision. It should also be noted that Mr. Mott agreed, even under his  
 3 view, it would be speculation to offer an opinion as to whether or not  
 Banks would have sexually assaulted Jane Doe were he not a corrections  
 4 officer.

5 C) ¶4(B): "this lack of policies, training, procedures and  
 6 supervision continues . . . ." Finding: Not relevant nor based on  
 7 personal knowledge.

8 D) ¶4(B): "...this lack of policies, training, procedures . . .  
 9 will lead to foreseeable civil rights violations." Finding: Lack of  
 10 demonstrated personal knowledge. The expert testified that he does not  
 11 know of any civil rights violations or even what "civil rights  
 12 violations" means.

13 E) ¶4(B): "...this lack of policies, training, procedures and  
 14 supervision continues and demonstrates the deliberate indifference of the  
 15 Whitman County Sheriff's Office . . . ." Finding: Inadmissible legal  
 16 conclusion.

17 F) ¶6: "These individuals . . . lacked the proper training and  
 18 expertise to conduct such an investigation." Finding: Lack of  
 19 demonstrated personal knowledge.

20 G) ¶7: "deficiencies in training, policies and supervision and  
 21 procedures are pervasive and ongoing and constitute the custom and  
 22 practice in operation of the Whitman County Sheriff's Office." Finding:  
 23 Opinion based on speculation and lacking demonstrated personal knowledge.

24       3. Defendant's Motion for Summary Judgment, **Ct. Rec. 35**, is

25 **GRANTED**.

26       4. A finding that a defendant acted under color of state law is  
 27 not foreclosed by the defendant being off-duty at the time of the  
 28 deprivation of rights. *Latuszkin v. City of Chicago*, 250 F.3d 502, 505  
 29 (7<sup>th</sup> Cir.2001). However, because 42 U.S.C. § 1983 requires action taken  
 30 under color of law, "it is clear that 'personal pursuits' of police  
 31 officers do not give rise to section 1983 liability[.]" *Id.* at 548; see  
 32 also *Huffman v. County of Los Angeles*, 147 F.3d 1054, 1058 (9th Cir.1998)  
 33 ("Officers who engage in confrontations for personal reasons unrelated

1 to law enforcement, and do not 'purport or pretend' to be officers, do  
2 not act under the color of law." ). The Court finds that viewing the  
3 facts most favorably to the plaintiffs, no reasonable jury could conclude  
4 that Banks was acting under the color of law when he met Jane Doe Irish,  
5 a twelve or thirteen year old neighbor who was the daughter of close  
6 family friends, developed a relationship with her apart from his  
7 employment and sexually assaulted her at his home. Plaintiffs concede  
8 that at the time of the sexual misconduct which apparently occurred on  
9 several occasions over a two/three month period, Banks was off-duty, at  
10 his residence. Moreover, there is no evidence to suggest that he was  
11 acting in his capacity as a corrections officer or forcing Jane Doe Irish  
12 to engage in such conduct based upon his authority as a county  
13 corrections officer. Rather, the contact appears to have been wholly  
14 personal in nature, the source of which was not job-related or linked to  
15 his official capacity as a County employee.

17       5. The Court rejects the § 1983 claim against the County because  
18 no official policy or pattern of constitutional violations has been shown  
19 so as to hold the County liable under the Court's reading of *Monell v*  
20 *Department of Social Services*, 436 US 658, 56 L Ed 2d 611, 98 S Ct 2018  
21 (1978). A mere failure by the County to supervise its employees, by  
22 itself, is not sufficient to hold it liable under § 1983. Although the  
23 County could be held liable if the failure to supervise or the lack of  
24 a proper training program was so severe as to reach the level of "gross  
25 negligence" or "deliberate indifference" to the deprivation of the  
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1 plaintiff's constitutional rights, the evidence before this Court does  
2 not indicate this is the case. Further, the concept of "deliberate  
3 indifference" does not hold the County at fault for the actions of its  
4 employees, on a respondeat superior basis--it holds the County liable for  
5 its own actions which result in deprivation of constitutional rights.  
6 Additionally, Plaintiffs indicated at the hearing they are not pursuing  
7 any state law negligence claim. Accordingly, any state claim contained  
8 within the pleadings is also dismissed herewith.

9  
10 6. "Custom or policy" supporting recovery against a governmental  
11 entity under §1983 can take one of three forms: (1) an express policy  
12 that, when enforced, causes a constitutional deprivation, (2) a  
13 widespread practice that, although not authorized by written law or  
14 express municipal policy, is so permanent and well-settled as to  
15 constitute "custom or usage" with the force of law, or (3) an allegation  
16 that the constitutional injury was caused by a person with final  
17 policymaking authority; thus, "custom or policy" may be established by  
18 an allegation that the constitutional injury was caused by a person with  
19 final policymaking authority. 42 U.S.C.A. §1983. *Juniel v. Park*  
20 *Forest-Chicago Heights School Dist.* 163, 176 F. Supp. 2d 842 (N.D. Ill.  
21 2001), *aff'd*, 46 Fed. Appx. 853, 169 Ed. Law Rep. 556 (7th Cir. 2002).  
22 Plaintiffs are unable to establish an official policy or custom.  
23 Plaintiffs allege generally a policy or custom of "inaction" - that the  
24 County failed to properly train or supervise both "correction officers"  
25 and "criminal investigators. The evidence indicates, however, the staff

1 of the sheriff of Whitman County who were assigned to investigate Banks'  
2 alleged misconduct did have such training in the investigation of sex  
3 crimes. As to the initial investigation by the County that failed to  
4 uncover Banks' sexual contact with Jane Doe, this does not itself  
5 evidence a policy or custom of inadequate training. Based upon the  
6 interviews with the witnesses, and Jane Doe's adamant denial of any  
7 sexual contact (which was, at that time, joined in by Cherie Irish, Jane  
8 Doe's mother), it is not surprising that the earlier conduct remained  
9 undiscovered.

10       7. Banks' prior misconduct occurring on the job (i.e., the occasion  
11 of bringing unauthorized guests to work and engaging in conduct which  
12 violated jail policies and procedures such as excessive TV watching,  
13 excessive sick leave) was not itself unconstitutional and/or highly  
14 indicative of future unconstitutional conduct. In other words, Banks'  
15 conduct of occasionally bringing family members and friends to work with  
16 him as a jailer, with or without the permission of Cpt. Ingalls, cannot  
17 be said to be "highly predictive" that he would have illegal sexual  
18 conduct with minors off-duty, at his own home. Moreover, Banks  
19 immediately stopped bringing outsiders to the jail when he was advised  
20 to cease and desist some three months or more before his off-duty  
21 criminal activity with Jane Doe Irish came to light. Banks' conduct  
22 toward Jane Doe Irish was too outrageous for it to be considered  
23 foreseeable by the County. Further, it is clear that Banks had no  
24 intention to further the County's interest but was motivated solely by  
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1 a desire to gratify his own personal interests.

2 **IT IS SO ORDERED.** The District Court Executive is directed to file  
3 this Order, provide copies to counsel, enter judgment in favor of the  
4 Defendant and CLOSE the file.

5 **DATED** this 17th day of November, 2006.  
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7 *s/Lonny R. Sukko*

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8 LONNY R. SUKO  
9 UNITED STATES DISTRICT JUDGE